SURFACE TRANSPORTATION BOARD[1]

DECISION[2]

No. 41644

COMET PRODUCTS, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41645

COMSTOCK FOODS, DIVISION OF CURTIS BURNS, INC.
--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41646

ELMIRA LITHO, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

No. 41647

FRITO LAY, INC.--PETITION FOR DECLARATORY ORDER--
CERTAIN RATES AND PRACTICES OF J.H. WARE TRUCKING, INC.

Decided: August 21, 1997

We find that the collection of undercharges sought in these proceedings would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Accordingly, we will not reach the other issues raised in these proceedings.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to proceedings that were pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. While this decision generally applies the law in effect prior to the Act, new 49 U.S.C. 13711(g) provides that new section 13711 applies to cases pending as of January 1, 1996, and hence section 13711 will be applied to the factual situation presented in these proceedings. Unless otherwise indicated, citations are to the former sections of the statute.

[2] This decision embraces four proceedings involving the same respondent and similar facts and issues.

BACKGROUND

These matters arise out of the efforts of The Plan Committee on behalf of J.H. Ware Trucking, Inc. (Ware or respondent) , a former motor common and contract carrier,[3] to collect undercharges from Comet Products, Inc. (Comet), Comstock Foods, Division of Curtis Burns, Inc. (Comstock), Elmira Litho, Inc. (Elmira), and Frito Lay, Inc. (Frito Lay) (collectively petitioners). These proceedings are before the Board on referral from the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, Case Nos. 91-43310-399, *J.H. Ware Trucking, Inc.--Debtor v. Comet Products, Inc.*, Adv. No. 93-4269, *J.H. Ware Trucking, Inc.--Debtor v. Comstock Foods, Division of Curtis Burns, Inc.*, Adv. No. 93-4292, *J.H. Ware Trucking, Inc.--Debtor v. Elmira Litho, Inc.*, Adv. No. 93-4318, and *J.H. Ware Trucking, Inc.--Debtor v. Frito Lay, Inc.*, Adv. No. 93-4319.

In the court proceedings, Ware seeks to collect undercharges allegedly due, in addition to amounts previously paid, in the following amounts: (1) $4,928.39, plus interest, from Comet, for transporting 5 shipments of Freight All Kinds (FAK) from Chelmsford, MA, between July 5, 1990, and February 22, 1991; (2) $3,126.44, plus interest, from Comstock, for transporting 9 FAK shipments from Bergen and Brockport, NY, to Birmingham, AL, Chattanooga, TN, Augusta and Montezuma, GA, and Independence, MO, between June 29, 1990, and June 17, 1991; (3) $8,928.06, plus interest, from Elmira, for transporting 43 shipments between July 19, 1990, and July 13, 1991; and (4) $2,062.74, plus interest, from Frito Lay, for transporting 16 FAK shipments from Dunkirk, NY, to Batavia, IL, Norcross, GA, Topeka, KS, and Allen Park, MI, between December 11, 1990, and February 19, 1991. By orders dated October 13, 1995, the court stayed the proceedings and directed petitioners to submit the issue of contract carriage to the ICC for determination.

Pursuant to the court orders, petitions were filed on October 25, 1995, by Comet in No. 41644, by Comstock in No. 41645, by Elmira in No. 41646, and by Frito Lay in No. 41647, requesting the ICC to resolve issues of contract carriage and unreasonable practice. By decision served November 3, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. Ware filed answers on November 29, 1995. Petitioners filed their opening statements on January 2, 1996. Ware filed its replies on August 9, 1996. Petitioners filed their rebuttal statements on August 27, 1996.

Petitioners contend that the shipments at issue were transported by Ware under its contract carrier authority pursuant to a duly executed written agreement between Ware and C. H. Robinson Company, d/b/a ETS Regulated Transportation Broker (Robinson), a third party broker that arranged for the subject movements on behalf of petitioners.[4] They assert that Robinson was billed by Ware for the transportation services rendered and made payment to Ware in accordance with the terms of the agreement. Petitioners further contend that Ware's efforts to collect undercharges in these proceedings constitute an unreasonable practice under section 2(e) of the NRA.

Petitioners support their contentions with verified statements submitted by Bernard Madej, Robinson Vice President of Logistics. Mr. Madej states that Robinson entered into a Master Contract Agreement with Ware on March 27, 1985. A copy of the agreement together with a form carrier shipment acceptance confirmation notice are attached as Exhibit A to Mr. Madej's statements.[5] Mr. Madej notes that the agreement enabled Robinson to provide an immediate

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[3] On May 20, 1991, Ware filed for bankruptcy under Chapter 11 of the United States Bankruptcy Code. From May 20, 1991, to April 14, 1992, Ware operated as a debtor-in-possession under Chapter 11. On April 14, 1992, a second amended plan of liquidation was confirmed pursuant to which causes of action belonging to Ware were authorized to be brought in the name of The Plan Committee, through Wendi S. Alper, Distribution Agent, on behalf of Ware.

[4] Robinson conducted its broker operations under License No. MC-131029.

[5] Among the terms and conditions set forth in the agreement are the following: (1) Ware (continued...)

response to traffic opportunities by authorizing Robinson to quote rates to be confirmed in writing within 24 hours.[6] Mr. Madej maintains that petitioners tendered each of the subject shipments to Robinson and Robinson engaged the services of Ware. According to Mr. Madej, Robinson tendered the subject shipments to Ware pursuant to the terms of the contract and in reliance on the agreed-to or offered rate; Ware invoiced Robinson and Robinson paid Ware for each of the subject shipments in accordance with the terms of the contract; and Ware accepted the Robinson payments without question.

Attached as Exhibit D to Mr. Madej's verified statements in Nos. 41644, 41645, and 41647 are copies of the "corrected freight bills" as well as the original freight invoices issued by Ware. Each of the originally issued invoices are billed to Robinson and indicate the assessment of flat rate or truckload rate charges. Exhibit D to Mr. Madej's verified statement in No. 41646 consists of statement of claim forms[7] which collectively list each of the subject Elmira shipments, the charge originally assessed and paid for that shipment, the total shipment charge that allegedly should have been assessed based on the Ware undercharge claim, and the asserted balance due for the shipment.[8]

In reply, respondent asserts that the shipments at issue were transported by Ware as a common carrier; and that, as petitioners had not been offered transportation rates by Ware, collection of its lawfully filed common carrier rates would not constitute an unreasonable practice.

DISCUSSION AND CONCLUSIONS

We dispose of these proceedings under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

At the outset, we recognize that the court referred the issue of common/contract carriage for our consideration, and that petitioners in their defense focused primarily on the common/contract carriage issue. Nevertheless, the Board's use of section 2(e)'s "unreasonable practice" provisions to resolve these matters is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by the court or raised by the parties. Rather, it may choose to decide cases on other grounds within its jurisdiction, *Gantrade Corp.--Pet. for Decl. Order--Ritter Transp., Inc.*, No. 40515 (ICC served May 8, 1995).

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[5](...continued)
appoints and retains Robinson to act as its agent for the sole purpose of securing merchandise for transportation; (2) all traffic tendered to Ware by Robinson is subject to the terms of the agreement; (3) Robinson is to offer freight available for dispatch to Ware at a flat or per unit rate that may be accepted or rejected by Ware; (4) Robinson is to arrange for the tendering of traffic to Ware and Ware is to issue bills of lading upon receipt of the traffic; (5) the relationship of Ware to Robinson is understood by the parties to be that of an independent contractor; (6) Robinson is to pay Ware the delivery rates and charges negotiated, even if the shipper fails to pay Robinson (the Robinson payment guarantee is specifically understood by the parties to be part of the consideration for the agreement).

[6] Under the agreement, when a shipment became available for dispatch, Robinson was to offer the shipment to Ware at an orally quoted rate. If the oral quote was agreed to by Ware, Robinson would issue a confirmation notice. Unless an objection to the confirmation notice was issued by Ware within 24 hours of its receipt of the notice, Ware was presumed to have agreed to the terms and conditions stated in the notice.

[7] The statement of claim forms were attached to the original court complaint filed against Elmira on behalf of Ware.

[8] Mr. Madej states that respondent had failed to provide copies of freight bills or other selected documents relating to its undercharge claims against Elmira as required by the November 3, 1995 decision of the ICC.

With the question of NRA's applicability now beyond doubt, the Board has acted to use section 2(e) to more readily dispose of undercharge cases on its docket, even in those cases where, as here, the primary regulatory defense raised by the shipper against the undercharge claim has been contract carriage. *E.g., Chiquita Brands, Inc.--Pet. for Decl. Order--Olympic Express, Inc.*, No. 41032 (STB served Oct. 22, 1996) and *Southware Company et al.--Pet. for Decl. Order--Jones Truck Lines, Inc.*, No. 41543 (STB served Aug. 7, 1996). As illustrated by these cases, that has occurred because, in most instances, a contract establishes "written evidence" that the parties intended a negotiated, unfiled rate to supplant the filed tariff rate that a nonoperating carrier such as Ware now retroactively seeks to enforce, and for which the NRA, through section 2(e), provides a complete defense. Thus, while the petitioners relied principally on a contract carriage defense, our use of section 2(e), rather than a common/contract determination, to resolve these proceedings is fully consistent with our present approach in all of the court-referred undercharge cases on our docket.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation services . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[9]

Here, it is undisputed that Ware is no longer an operating carrier.[10] Accordingly, we may proceed to determine whether Ware's attempt to collect undercharges (the difference between the applicable filed rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether in each of the subject proceedings sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed upon by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a 1985 master contract carrier agreement between Ware and Robinson. Some of the provisions of the agreement indicate that Robinson is acting in the capacity of an independent contractor, with Robinson's shipper customers standing in the position of third-party beneficiaries to the agreement. Regardless of whether Ware's services to Robinson were held out under its contract carrier authority--which they may well have been--the master agreement confirms the existence of a negotiated rate agreement between Ware and Robinson. In addition, petitioners in Nos. 41644, 41645, and 41647 have submitted copies of original freight invoices issued by Ware and billed to Robinson which reflect the original assessment of flat or unit rates called for in the agreement. With respect to No. 41646, petitioner has submitted statement of claim forms indicating that the rates originally assessed by respondent were consistently below those that Ware is here attempting to collect. We find this evidence sufficient to satisfy the written evidence requirement. *E. A. Miller, Inc.--Rates and Practices of Best*, 10 I.C.C.2d 235 (1994) (*E.A. Miller*). *See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp.*, C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes

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[9] Prior to the ICC Termination Act, there had been a limitation that made section 2(e) of the NRA applicable only to transportation service provided prior to September 30, 1990. But the ICC Termination Act deleted the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996. *See* 49 U.S.C. 13711(g). Thus, the remedies in section 2(e) may be invoked as to all of the shipments at issue in these proceedings, including those shipments that were transported after September 30, 1990.

[10] Board records disclose that Ware held common carrier and contract carrier authority under Docket No. MC-139973 until the certificates and permits were revoked on July 27, 1992.

that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In these cases, the evidence is substantial that the rates originally billed by Ware and paid by Robertson were rates agreed to in negotiations between Robinson and Ware. The original freight bills issued by Ware and the terms for the assessment of rates described in the 1985 master agreement confirm the testimony of Mr. Madej and reflect the existence of negotiated rates.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)] and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, the evidence establishes that Robinson, acting on behalf of its customers Comet, Comstock, Elmira, and Frito Lay,[11] was offered negotiated rates by Ware. Robinson tendered traffic on behalf of its customers to Ware in reasonable reliance on the offered rates. Ware billed and collected the negotiated rates. Now, Ware is seeking to collect additional payments from petitioners, customers of Robinson, based on higher rates filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Ware to attempt to collect undercharges from petitioners for the shipments at issue in these proceedings.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. These proceedings are discontinued.

2. This decision is effective on its service date.

[11] Based on the record in these proceedings, the evidence indicates that Robinson acted as an independent contractor in its dealings with Ware, and thus was not acting as Ware's agent with respect to petitioners.

3. A copy of this decision will be mailed to:

The Honorable Barry S. Schermer
United States Bankruptcy Court
for the Eastern District of Missouri
One Metropolitan Square
7th Floor, 211 North Broadway
St. Louis, MO 63102-2743

Re: Case Nos. 91-43310-399,
Adv. Nos. 93-4269, 93-4292, 93-4318,
and 93-4319.

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary